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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL RAMIREZ,
Plaintiff,
v.
JO ANNE B. BARNHART,
COMMISSIONER, SOCIAL SECURITY
ADMINISTRATION,
Defendant.

For the reasons set forth below, it is ordered that the matter be **REMANDED** pursuant to sentence four of 42 U.S.C. Section 405(g) to defendant Commissioner of Social Security ("the Commissioner") for further administrative action consistent with this opinion and order.

SUMMARY OF PROCEEDINGS

On May 31, 2006, plaintiff, Fidel Ramirez, ("plaintiff"), filed a complaint seeking judicial review of the denial of benefits by the Commissioner pursuant to the Social Security Act ("the Act"). The parties filed a consent to proceed before the magistrate judge. On September 12, 2006, plaintiff filed an opening brief. On November 27, 2006, the Commissioner filed a motion to reform judgment or, alternatively to remand for further proceedings.

SUMMARY OF ADMINISTRATIVE RECORD

1. Proceedings

On June 24, 2004, plaintiff filed an application for disability insurance benefits, alleging disability since March 20, 2004 due to a fractured right leg. (TR 39, 63-64).¹ The application was denied. (TR 29).

On September 13, 2004, plaintiff filed a request for a hearing before an administrative law judge ("ALJ") in which he alleged that he had a herniated disc in his back. (TR 34). On November 23, 2005, plaintiff, represented by an attorney and accompanied by an interpreter, appeared and testified before an ALJ. (TR 257-73). On December 2, 2005, the ALJ issued a decision that plaintiff was capable of performing a full range of medium work and, therefore, that he was not precluded from performing his past relevant work as a welder. (TR 18-19). Accordingly, the ALJ found that plaintiff was not disabled, as defined by the Act, and thus was not eligible for benefits. (TR 15-19). On December 19, 2005, plaintiff filed a request with the Social Security Appeals Council to review the ALJ's decision. (TR 8). On April 17, 2006, the request was denied. (TR 5). Accordingly, the ALJ's decision stands as the final decision of the Commissioner. Plaintiff subsequently sought judicial review in this court.

2. Summary Of The Evidence

The ALJ's decision is attached as an exhibit to this opinion and

¹ "TR" refers to the transcript of the record of administrative proceedings in this case and will be followed by the relevant page number(s) of the transcript.

1 order and, except as otherwise noted, materially summarizes the
2 evidence in the case.

3 PLAINTIFF'S CONTENTIONS

4 Plaintiff contends as follows:

- 5 1. The ALJ's residual functional capacity assessment lacks the
6 support of substantial evidence;
7 2. The ALJ failed to properly evaluate plaintiff's subjective
8 complaints.

9 STANDARD OF REVIEW

10 Under 42 U.S.C. §405(g), this court reviews the Commissioner's
11 decision to determine if: (1) the Commissioner's findings are
12 supported by substantial evidence; and, (2) the Commissioner used
13 proper legal standards. Macri v. Chater, 93 F.3d 540, 543 (9th Cir.
14 1996). Substantial evidence means "more than a mere scintilla,"
15 Richardson v. Perales, 402 U.S. 389, 401 (1971), but less than a
16 preponderance. Sandgate v. Chater, 108 F.3d 978, 980 (9th Cir.
17 1997).

18 When the evidence can reasonably support either affirming or
19 reversing the Commissioner's conclusion, however, the Court may not
20 substitute its judgment for that of the Commissioner. Flaten v.
21 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th Cir.
22 1995). The court has the authority to affirm, modify, or reverse
23 the Commissioner's decision "with or without remanding the cause for
24 rehearing." 42 U.S.C. §405(g). Remand is appropriate where
25 additional proceedings would remedy defects in the Commissioner's
26 decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989).

DISCUSSION

1. The Sequential Evaluation

A person is "disabled" for the purpose of receiving social security benefits if he or she is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A).

The Commissioner has established a five-step sequential evaluation for determining whether a person is disabled. First, it is determined whether the person is engaged in "substantial gainful activity." If so, benefits are denied.

Second, if the person is not so engaged, it is determined whether the person has a medically severe impairment or combination of impairments. If the person does not have a severe impairment or combination of impairments, benefits are denied.

Third, if the person has a severe impairment, it is determined whether the impairment meets or equals one of a number of "listed impairments." If the impairment meets or equals a "listed impairment," the person is conclusively presumed to be disabled.

Fourth, if the impairment does not meet or equal a "listed impairment," it is determined whether the impairment prevents the person from performing past relevant work. If the person can perform past relevant work, benefits are denied.

Fifth, if the person cannot perform past relevant work, the burden shifts to the Commissioner to show that the person is able to perform other kinds of work. The person is entitled to benefits only

1 if the person is unable to perform other work. 20 C.F.R. §§404.1520,
2 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

3 2. Issues

4 A. RFC Assessment

5 Plaintiff contends that the ALJ's assessment that he has a
6 residual functional capacity that enables him to perform medium work
7 is not supported by substantial evidence.

8 The court will affirm the ALJ's determination of the plaintiff's
9 RFC if the ALJ applied the proper legal standard and his decision is
10 supported by substantial evidence. Bayliss v. Barnhart, 427 F.3d
11 1211, 1217 (9th Cir. 2005), citing Morgan v. Comm'r of the Soc. Sec.
12 Admin., 169 F.3d 595 (9th Cir. 1999). In making his RFC
13 determination, the ALJ may properly take into account those
14 limitations for which there is record support and that did not depend
15 on the plaintiff's testimony where the ALJ properly found plaintiff's
16 testimony not credible. Id.

17 Here, plaintiff alleged that he became disabled when he broke his
18 lower leg on March 30, 2004. He does not contend that he was disabled
19 before that period. However, in September of 2001, plaintiff
20 sustained a workplace injury to his lower back and right hip. In
21 2003, during his workers' compensation proceedings, he was examined by
22 Dr. Alexander Angerman, the Agreed Medical Examiner, who diagnosed
23 plaintiff with lumbosacral strain and sprain with right-sided
24 radiculitis and right hip strain and found that he had restrictions
25 that precluded heavy work, as that term is defined under California
26 workers' compensation law, prolonged sitting and climbing, and
27 repeated bending and stooping. (TR 157, 177). Dr. Angerman found
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1 that this condition prevented plaintiff from performing his past work
2 and that plaintiff was a candidate for vocational rehabilitation. (TR
3 157). Dr. Angerman also found that plaintiff's condition was
4 "permanent and stationary," as those terms are defined under
5 California Worker's Compensation law. (TR 156).

6 The ALJ found that plaintiff suffered from the following severe
7 impairments: bony demineralization and status post fracture of the
8 right, lower extremity, lumbar strain and sprain with radiculitis, and
9 right hip strain. (TR 19). The ALJ found that plaintiff was capable
10 of performing a full range of medium work. (Id.).

11 This finding is not supported by substantial evidence. The ALJ
12 relied on the state agency's physician August 2004 assessment that
13 plaintiff's condition would not likely be significantly limiting for
14 any period of 12 consecutive months. (TR 18; 124). However, it
15 appears that the state agency physician was reviewing only records
16 concerning petitioner's leg fracture (which was the only disabling
17 impairment plaintiff alleged in his initial application). (TR 124).

18 Moreover, notwithstanding defendant's request that this court
19 reform the ALJ's judgment, it appears to this court that the ALJ
20 acknowledged that Dr. Angerman's assessment, when translated into
21 Social Security terminology, essentially limited plaintiff to light
22 work.² (TR 17). Dr. Angerman's assessment that plaintiff could

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24 ²In considering the medical opinions of physicians who
25 evaluated the plaintiff in the context of a workers' compensation
26 case, the ALJ must consider the differences in the workers'
27 compensation terms used by the physician and Social Security
28 terminology. See Desrosiers v. Sec. of Health & Human Servs.,
846 F.2d 573, 576 (9th Cir. 1988). In considering workers'
compensation work capacity assessments in a social security case,
"the ALJ is entitled to draw inferences logically flowing from

1 perform only light work when translated into Social Security terms, is
2 uncontradicted. The record is ambiguous as to whether the plaintiff
3 performed any significant medium work since his workplace back and hip
4 injury in 2001. (See TR 54, 57, 59, 76, 268-69; but see TR
5 64(indicating that plaintiff worked as a welder until March of 2004)).
6 However, before rejecting Dr. Angerman's assessment, the ALJ was
7 required to provide clear and convincing reasons for doing so. See
8 Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1996) (the ALJ must
9 provide clear and convincing reasons for rejecting the uncontradicted
10 opinion of an examining physician). The ALJ provided no reasons for
11 rejecting Dr. Angerman's assessment that plaintiff could perform only
12 light work.

13 Further, although the ALJ found that Dr. Angerman's assessment
14 translated into a limitation to light work in social security terms,
15 the ALJ did not translate the doctor's finding in California workers'
16 compensation terms that plaintiff's condition was "permanent and
17 stationary" or even consider the impact of that finding on plaintiff's
18 social security claim for disability. Under California workers'
19 compensation law, a disability is considered permanent after the
20 employee has reached maximum medical improvement or his or her
21 condition has been stationary for a reasonable period of time. Dept.
22 Of Rehabilitation v. Workers' Compensation Appeals Board, 30 Cal.4th

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24 the evidence." Macri v. Chater, 93 F.3d 540, 544 (9th Cir.
25 1996) (where plaintiff was precluded from "heavy lifting, repeated
26 bending or stooping" in workers' compensation terms, which
27 equates to half of his pre-injury capacity under California
28 workers' compensation law, the ALJ's could logically infer in a
social security case that plaintiff's current lifting capacity
was limited to light work where his pre-injury capacity was for
medium work).

1 1281, 1292 (2003); see also Cal.Code Regs., tit. 8, § 10152("A
 2 disability is considered permanent when the employee has reached
 3 maximal medical improvement, meaning his or her condition is well
 4 stabilized, and unlikely to change substantially in the next year
 5 without or without medical attention"). Accordingly, the ALJ should
 6 have considered Dr. Angerman's assessment that plaintiff's back and
 7 hip impairment was permanent and stationary as those terms are defined
 8 under California workers' compensation law. See Desrosiers v. Sec. of
 9 Health & Human Servs., 846 F.2d at 576(ALJ's decision that plaintiff
 10 could perform light work was not supported by substantial evidence
 11 because the ALJ had not adequately considered definitional differences
 12 between the California workers' compensation system and the Social
 13 Security Act). Plaintiff may well be able to work.³ However,
 14 the ALJ's assessment that plaintiff can perform medium work is not
 15 support by substantial evidence in the record. Accordingly, remand is
 16 warranted.

18 ³Plaintiff contends that from March 20, 2004 through
 19 February 2005 he could perform only sedentary work because his
 20 leg was still healing and he could not bear his weight on that
 21 leg. (Plaintiff's Opening Brief at 5). March 20, 2004 to
 22 February 2005 is less than a year and does not meet the
 23 durational requirement. See 42 U.S.C. § 423(d)(1)(A). Plaintiff
 24 contends that after February of 2005 his leg had healed enough to
 25 restore him to his pre-onset capacity of light work.
 26 (Plaintiff's Opening Brief at 5). Thus, in less than twelve
 27 months plaintiff was restored to his *pre-disability* capacity.
 28 However, the ALJ stopped at step four of the sequential analysis
 and this court cannot affirm the denial of benefits on a ground
 not invoked by the Commissioner. See Stout v. Commissioner of
Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006) ("if the
 Commissioner's request that the [court] dismiss the ALJ's error
 as harmless 'invites [the court] to affirm the denial of benefits
 on a ground not invoked by the Commissioner in denying the
 benefits originally, then [the court] must decline.'" (citation
 omitted).

1 Plaintiff contends that the court should simply reverse the
2 Commissioner's decision and remand for an award of benefits because
3 plaintiff is currently limited to light work. Plaintiff asserts that
4 Rule 202.09 of the Medical and Vocational Guidelines (the "Grids")
5 direct a finding of disabled if plaintiff is limited to light work and
6 therefore reversal is required. Where the application of the Grids
7 directs a finding of disability, that finding must be accepted by the
8 Commissioner. Lounsbury v. Barnhart, __ F.3d __, 2006 WL 2684480
9 ((9th Cir. 2006). However, Rule 202.09 only directs a finding of
10 disabled for a non-English-speaking person in plaintiff's age category
11 if their past work was "unskilled or none." See 20 C.F.R. Pt. 404,
12 Subpt. P, App. 2, Rule 202.09. The ALJ found that plaintiff's past
13 work was skilled or semi-skilled. (TR 18).

14 Thus, remand for further proceedings is warranted. On remand,
15 the Commissioner may want to have plaintiff examined consultatively to
16 determine if there have been any changes in plaintiff's back and hip
17 impairment since he was examined by Dr. Angerman.

18 B. Credibility Finding

19 Plaintiff also contends that the ALJ failed to properly evaluate
20 his subjective complaints.

21 If the Commissioner finds plaintiff's allegations of severity not
22 credible, the Commissioner must make specific findings which support
23 this conclusion. The Commissioner's findings, properly supported by
24 the record, must be sufficiently specific to allow a reviewing court
25 to conclude that the Commissioner rejected plaintiff's testimony on
26 permissible grounds and did not arbitrarily discredit plaintiff's
27 testimony regarding pain. Bunnell v. Sullivan, 947 F.2d 341, 345-46

1 (9th Cir. 1991). The Commissioner may discredit plaintiff's
2 allegations based on inconsistencies in the testimony or on relevant
3 character evidence. Id. at 346. However, the Commissioner may not
4 discredit plaintiff's testimony of pain solely because the degree of
5 pain alleged by plaintiff is not supported by objective medical
6 evidence. Id. at 345-47.

7 Here, plaintiff alleged in his daily activities questionnaire and
8 pain questionnaire submitted concurrently with his application for
9 benefits that the pain of his broken leg essentially prevented him
10 from doing all but very limited activities. (TR 70-75). At the
11 hearing plaintiff testified that he could not lift heavy items due to
12 his back problems, could be on his feet only two hours and sit for
13 only an hour, could not bend, stoop or crouch without pain and could
14 walk only very slowly. (TR 269). The ALJ found plaintiff's
15 allegations of markedly limiting pain or impairment not credible
16 because plaintiff has not consistently required any strong medication
17 for pain and has been taking only Ibuprofen. (TR 17). This is a
18 legitimate reason for discounting plaintiff's allegations of disabling
19 pain and is supported by the record (TR 87, 91, 147). Bunnell v.
20 Sullivan, 947 F.2d at 346; see also Johnson v. Shalala, 60 F.3d 1428,
21 1434 (9th Cir. 1995) (ALJ properly found plaintiff's claims of
22 disabling limitations not totally credible in light of plaintiff's
23 conservative treatment). Remand is not warranted on this ground.

1 REMAND IS APPROPRIATE IN THIS CASE

2 The decision whether to remand a case for additional evidence is
3 within the discretion of the court. Sprague v. Bowen, 812 F.2d 1226,
4 1232 (9th Cir. 1987). Remand is appropriate if the record is
5 incomplete and additional proceedings would remedy defects in the
6 Commissioner's decision. McAllister v. Sullivan, 888 F.2d 599, 603
7 (9th Cir. 1989).

8 Having considered the record as a whole, it appears that the
9 present record is insufficiently developed.

10 CONCLUSION

11 Accordingly, it is ordered that the matter be **REMANDED** pursuant
12 to sentence four of 42 U.S.C. §405(g) to the Commissioner for further
13 administrative action consistent with this opinion.

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15 DATED: November 28, 2006

16 CAROLYN TURCHIN

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CAROLYN TURCHIN
18 UNITED STATES MAGISTRATE JUDGE
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